IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 20TH JULY 2007 / 29TH ASHADHA 1929

WP(C).No. 13649 of 2006(Y)

OS.134/2000 of MUNSIFF COURT, PERUMBAVOOR

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PETITIONER:

GOPINANTHAN NAIR, S/O.SANKARAN NAIR,
AGED 64 YEARS, UNICHENATTU, PALLIPPRAM KARA,
MARAMPILLY VILLAGE, ERNAKULAM DISTRICT.

BY ADV. SRI.RAJESH VIJAYAN

RESPONDENTS:

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1. PADMANABHAN NAIR, AGED 86 YEARS,
S/O.RAMAN NAIR, UNICHENATTU, PALLIPRAM KARA,
MARAMPILLY VILLAGE, ERNAKULAM DISTRICT.

2. LEKSHMIKUTTY AMMA,
D/O.GOURI AMMA, DO. DO.

3. PURUSHOTHAMAN, AGED 55 YEARS,
S/O.PADMANABHAN NAIR, DO. DO.

4. SANTHOSH KUMAR, S/O.PADMANABHAN NAIR,
DO. DO.

BY ADV. SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF PETITION IA 2316 OF 2004 IN OS NO.134 OF 2000 DT.03.01.2005.

EXT.P2 : TRUE COPY OF ORDER IN IA 2316 OF 2004 IN OS NO.134 OF 2000 DT.12.11.2004.

EXT.P3 : TRUE COPY OF JUDGMENT IN CMA NO.5 OF 2005, SUB COURT, NORTH PARUR DT.10.6.2005.

EXT.P4 : TRUE COPY OF EXECUTION PETITION NO.11/06 DT.14.02.2006.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 13649 OF 2006

Dated this the 20th day of July, 2007

JUDGMENT

Ext.P2 order by which the learned Munsiff allowed the application filed by the petitioner for leave for withdrawal from the suit with liberty, in part. i.e. by granting leave to withdraw from the suit but declining liberty on with cost of Rs.10,000/- is under challenge.

Heard Sri.Rajesh Vijayan, learned counsel for the petitioner and Mr.V.Rajendran, learned counsel for the respondent. Mr.Rajesh Vijayan would draw my attention to Sub Rules 3 and 4 of Order XXIII Rule 1 and submit that the court has power to award cost only when Sub Rule 4 applies and not when Sub Rule 3 is applied and leave is granted for withdrawal though not to the extent sought for. Though the above submission is attractive, the powers of the court under Section 35 to award cost when incidental proceedings are decided can not be in doubt. The learned Munsiff had fairly good reasons to decide that the petitioner was liable to pay cost to the respondent on the application he filed under Order XXIII Rule 1 (3) (b). But the cost awarded appears to be on the high side. Even as I approve Ext.P2, there will be a modification regarding the cost under Ext.P2 by reducing it to Rs.3,000/- on condition that the reduced cost shall be paid by the petitioner within

one month from today. Payment shall be made through the counsel appearing for the respondent before the trial court. If payment is not made as above, Ext.P2 will operate in full without modification. Mr.Rajesh Vijayan had another argument that liberty to institute a fresh suit should have been granted since the evidence given by PW1 was against the plaintiff's interest. But I notice that the very same PW1 has filed the present Writ Petition. I am not inclined to interfere with the decision of the learned Munsiff under Ext.P2 declining leave to Sri.Gopinathan Nair to institute a fresh suit. But nothing stated in this judgment will stand in the way of any other competent person filing a suit for the temple in question on a genuine and subsisting cause of action.

PIUS C. KURIAKOSE, JUDGE

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